NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

SAM REED, SECRETARY OF STATE OF THE STATE OF WASHINGTON,

Petitioner,

v.

DEMOCRATIC PARTY OF WASHINGTON STATE; REPUBLICAN STATE COMMITTEE OF WASHINGTON; LIBERTARIAN PARTY OF WASHINGTON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *California Democratic Party v. Jones*, 530 U.S. 567 (2000), this Court declared that California could not lawfully use a "blanket" primary to select the nominees of political parties for state and federal partisan political offices, without the consent of the parties, because doing so violated the rights of the political parties to freedom of association and freedom of expression in conducting party affairs. Since 1935, Washington has also used a "blanket" primary for partisan offices, but uses the primary to winnow the field of candidates for the general election, not to "nominate" party standard bearers for public office.

Does a blanket primary that winnows the field of candidates for partisan office in the general election—but does not nominate political party "standard bearers"—violate the First Amendment rights of association of political parties?

PARTIES

The parties to the proceeding below were:

Petitioner: Sam Reed, Secretary of State, State of Washington. Petitioner was aligned as Defendant-Appellee below.

Respondents: (1) The Democratic Party of Washington State and the following individuals who were or are officers and adherents of that Party: Paul Berendt, James Apa, Helen Carlstrom, Vivan Caver, Charlotte Coker, Edward Cote, Ted Highley, Sally Kapphahn, Karen Marchioro, David McDonald, Joseph Nilsson, David Peterson, Margarita Prentice, Karen Price, Marilyn Sayan, John Thompson, and Ya-Yue Van. These Respondents were aligned as Plaintiffs-Appellants below.

(2) The Republican State Committee of Washington and the following individuals who were or are officers and adherents of that Party: Jeff Kent, Lindsey Echelbarger, Chris Vance, Diane Tebelius, and Diane Ludlow. These respondents were aligned as Intervenors-Appellants below.

(3) The Libertarian Party of Washington and the following individuals who were or are officers and adherents of that Party: John Mills, Chris Caputo, Donald Crawford, and Erne Lewis. These Respondents were aligned as Intervenors-Appellants below.

(4) The Washington State Grange and two of its individual members: Terry Hunt and Jane Hodde. These Respondents were aligned as Intervenors-Appellees below.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of Secretary of State Sam Reed, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 343 F.3d 1198. *Dem. Party Wash.*, App. at 1a. The Court of Appeals' order denying the petition for rehearing and for rehearing en banc is unpublished. App. at 26a. The opinion of the United States District Court for the Western District of Washington is also unpublished. App. at 29a.

JURISDICTION

The judgment of the Ninth Circuit was entered September 15, 2003. On October 23, 2003, the court of appeals issued an order denying a timely petition for rehearing and petition for rehearing en banc. App. at 26a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Wash. Rev. Code § 29.18.010 provides:

"Candidates for the following offices shall be nominated at partisan primaries held pursuant to provisions of this chapter:

(1) Congressional offices;

(2) All state officers except (a) judicial offices and (b) the office of superintendent of public instruction;

(3) All county offices except (a) judicial offices and (b) those offices where a county home rule charter provides otherwise." App. at 89a.

Wash. Rev. Code § 29.18.200 provides:

"Except as provided otherwise in chapter 29.19 RCW, all properly registered voters may vote for their choice at any primary held under this title, for any candidate for each office, regardless of political affiliation and without a declaration of political faith or adherence on the part of the voter." App. at 92a.

Wash. Rev. Code § 29.30.095 provides:

"The name of a candidate for a partisan office for which a primary was conducted shall not be printed on the ballot for that office at the subsequent general election unless the candidate receives a number of votes equal to at least one percent of the total number cast for all candidates for that position sought and a plurality of the votes cast for the candidates of his or her party for that office at the preceding primary." App. at 96a.

STATEMENT

This case concerns a challenge to the system used in the State of Washington to conduct primary elections. Washington has historically conducted primaries using a system that permits every voter to fully participate in the selection of their elected officials, commonly referred to as a "blanket primary". This case presents the question whether Washington's system is *per se* unconstitutional based upon this Court's decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (*Cal. Dem. Party*), or is distinguishable from the system considered in the California case, based on a deeper inquiry into the legal and political context in Washington.

1. History Of Washington's Blanket Primary

In 1935, Washington adopted a blanket primary system for filling federal, state, and local partisan elective offices.[1] Voters in the primary may vote for any candidate for each office on the ballot, regardless of the political affiliation of the candidate and without any declaration of political faith or party adherence on the part of the voter.[2] Wash. Rev. Code

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[1] The blanket primary was originally proposed as an initiative measure to the Legislature by the Washington State Grange in 1934 (Initiative Measure No. 2). Following article II, section 1(a) of the Washington Constitution, the Legislature adopted the initiative as a statute during the 1935 Session. 1935 Wash. Laws ch. 26 (Initiative Measure No. 2).

[2] Washington statutes contain no provision requiring or authorizing voters to affiliate or register as adherents to a political party or organization, with the sole exception that party declarations may be required for the purpose of partici-

§ 29.18.200, App. at 92a. To qualify to have their names printed on the general election ballot, candidates must (1) obtain at least one percent of the total votes cast for all candidates for the office in the primary, and (2) receive a plurality of the votes cast for candidates designating a particular political party. Wash. Rev. Code § 29.30.095, App. at 96a.[3] This election system allows Washington voters to winnow the field of candidates before the general election, while still assuring that general election voters will have a choice between candidates designating two or more political affiliations.

Washington's blanket primary was twice challenged in the state courts, and twice upheld. In *Anderson v. Millikin*, 186 Wash. 602, 59 P.2d 295 (1936), the state supreme court rejected a challenge brought on a variety of grounds by the Democratic and Republican political parties. In *Heavey v. Chapman*, 93 Wn.2d 700, 611 P.2d 1256 (1980), the Democratic party and two of its officers again challenged the blanket primary, asserting that it infringed the political party's freedom of association. Again, the court upheld the blanket primary, which has now been in use in Washington for nearly seventy years.[4]

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pating in a party's presidential preference primary, when the party so requires. Wash. Rev. Code § 29.19.055, App. at 93a.

[3] Candidates filing for partisan elective office indicate their party designation on the filing papers. Wash. Rev. Code § 29.15.010(3), App. at 88a.

[4] In *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), this Court upheld those aspects of Washington's election law relating to the way candidates of minor parties qualify for

In 1996, California adopted its own version of the blanket primary through an initiative measure. Four political parties sued to invalidate it. Eventually, this Court invalidated California's blanket primary in *Cal. Dem. Party*., holding that California's election system forced the political parties to open up their party nomination processes to non-members of the parties (or members of rival parties) without their consent and in violation of their constitutional rights to free association and free expression.

2. Proceedings Below

Shortly after this Court issued its opinion in *Cal. Dem. Party*, the Washington State Democratic Party filed this action in the United States District Court for the Western District of Washington against the Washington State Secretary of State, the Washington State Attorney General, and local election officials, asserting that Washington's blanket primary was invalid for the reasons this Court applied to California. The state's other two major parties, the Republican and Libertarian parties, intervened as additional plaintiffs. The Washington State Grange and certain of its members intervened as additional defendants. The complaints sought both declaratory and injunctive relief.

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the ballot and noted in passing that Washington conducted a "blanket" primary. *Munro*, 479 U.S. at 192. Although the blanket primary context of Washington law was important in analyzing the rights of minor parties, the constitutionality of the blanket primary itself was not before the Court in *Munro*.

After preliminary proceedings not directly pertinent here, the parties filed cross-motions for summary judgment. The district court entered an order granting summary judgment to the defendants, on the alternative grounds that (1) Washington's election system is distinguishable from California's and (2) the plaintiff political parties had failed to meet their evidentiary burden of showing harm as the result of the conduct of Washington's blanket primary. App. at 42a-53a, 74a-82a.

3. The Ninth Circuit Appeal

The three political parties appealed the district court's ruling to the United States Court of Appeals for the Ninth Circuit. A three-judge panel reversed the district court. The panel concluded (without specific analysis on the point) that *Cal. Dem. Party* invalidated all blanket primaries, rejecting the notion that Washington's election system was distinguishable from California's. *Dem. Party Wash.*, App. at 13a. Having concluded that blanket primaries were invalid *per se*, the Ninth Circuit did not reach the evidentiary arguments presented. *Dem. Party Wash.*, App. at 24a. The decision remanded the case to the district court for entry of appropriate declaratory and injunctive relief. *Dem. Party Wash.*, App. at 25a.

The state defendants and the Grange both moved for rehearing and for rehearing en banc. These motions were denied by the Ninth Circuit October 23, 2003. App. at 26a.

REASONS FOR GRANTING THE PETITION

A lower federal court has struck down a long-standing state statute which has been upheld by the state's highest court on two different occasions. Furthermore, the lower court decision failed to analyze the whole context of Washington's election system in requiring the state to change the way it elects its officers and representatives. This context distinguishes Washington's blanket primary from the system held invalid in *Cal. Dem. Party*. Finally, this Court has been rightly generous with guidance to the states on questions concerning the right to vote, which sits at the very heart of our democratic system.

A. The Ninth Circuit Decision Conflicts With The Decisions Of Washington's State Supreme Court

Washington's blanket primary was upheld twice by the Washington Supreme Court. *Anderson v. Millikin,* 186 Wash. 602, 59 P.2d 295 (1936); *Heavey v. Chapman*, 93 Wn.2d 700, 611 P.2d 1256 (1980).[5] While the 1980 case was resolved primarily on the issue of the failure of the plaintiffs to demonstrate harm from the application of the blanket primary, the earlier 1936 case was a broad challenge based on a number of constitutional theories, including the asserted effect of the blanket

[5] The Alaska Supreme Court also upheld the form of blanket primary used in that state for many years. *O'Callaghan v. Alaska*, 914 P.2d 1250 (Alaska 1996). *But see O'Callaghan v. Alaska*, 6 P.3d 728 (2000).

primary on political parties and their constitutional rights. The Washington Supreme Court rejected each of these challenges. In reliance on these decisions, three generations of Washington voters have used the blanket primary as a part of the process for choosing their elected officers. This fact alone sharply contrasts with California, which adopted the blanket primary only in 1996.

As noted earlier, Washington's blanket primary was before this Court as recently as 1986 in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), in which the issue before the Court was whether Washington's blanket primary system adequately provided minor parties with reasonable access to the ballot. Reversing the court of appeals, this Court upheld Washington law in that regard. Although the constitutionality of the blanket primary itself was not challenged in *Munro*, this decision upholding state law reinforced the state's confidence that its election system met constitutional standards.

In 2000, this Court invalidated California's use of a blanket primary in *Cal. Dem. Party*, but based on the way California election law is structured and the role assigned to parties in California state law—factors not present in Washington. Washington's primary was not before the Court in the California case, and this Court took some pains to say that its decision was based on the specific issues raised by California law. *See* discussion *Cal. Dem. Party*, 530 U.S. at 584.

B. The Ninth Circuit's Decision Invalidates Washington's Longstanding Election System Without Considering The Important Distinctions Between Washington And California Law

1. The California Primary At Issue In *Cal. Dem. Party*

As the opening language of the opinion shows, this Court invalidated California's blanket primary because it was used to select the nominees of the political parties for public office:

> "Under California law, a candidate for public office has two routes to gain access to the general ballot for most state and federal elective offices. *He may receive the nomination of a qualified political party by winning its primary*, *see* Cal. Elec. Code Ann. §§ 15451, 13105(a) (West 1996); or he may file as an independent by obtaining (for a statewide race) the signatures of one percent of the State's electorate or (for other races) the signatures of three percent of the voting population of the area represented by the office in contest, *see* § 8400." *Cal. Dem. Party*, 530 U.S. at 569-70 (emphasis added) (footnote omitted).

Thus, the opinion is premised from the beginning on the fact that in California, to gain access to the general election ballot, one must either be the *nominee of a political party* or must qualify as an independent candidate. Before 1996, California had conducted "closed" primaries in which the nominees of each party were selected by those voters who had

publicly registered their affiliation with that party. *Cal. Dem. Party*, 530 U.S. at 570. California's Proposition 198, without changing the party registration system or otherwise altering the fundamental nature of the election, opened up each party's nomination process to the participation of all voters. *Id.* Thus, the California initiative attempted to engraft a blanket primary on an election system that, in all other respects, remained a party nomination process. Thus, the effect of the California initiative was to open each party's separate nominating process to participation by (1) voters registered in other parties and (2) voters who were not registered as affiliating with any party.[6]

The California decision fully recognized the prerogatives of states to determine their own election systems. *Cal. Dem. Party*, 530 U.S. at 572 (citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986)). The Court recognized that states may use primaries or other preliminary elections to select nominees for office. *Id.* (citing *American Party of Texas v. White*, 415 U.S. 767, 781 (1974)). The Court recognized that a state may regulate the manner in which political parties gain places on the ballot. *Id.* (citing *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)). Furthermore, while this Court found that California had failed to demonstrate a sufficient basis for using a blanket

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[6] In a footnote responding to the dissent, the *Cal. Dem. Party* majority opinion noted that elections were public affairs, but noted also that "when the election determines *a party's nominee* it is a party affair as well". *Cal. Dem. Party*, 530 U.S. at 573 n.4 (emphasis added).

primary, the Court recognized that at least some of the interests advanced by California might, under other circumstances, be sufficient to justify a state law. *Cal. Dem. Party*, 530 U.S. at 584.

2. Washington's Election Law As Distinguished From California's

Cal. Dem. Party left open the question whether a blanket primary could be used by a state which does not use the primary to select *party nominees* for elective office.[7] That is precisely the issue presented in the present challenge to Washington's blanket primary. Washington's election system uncouples the party organizations from the primary, without completely eliminating party affiliation as a factor in electing public officers. The most striking distinction between Washington and California is that Washington has never registered voters by party affiliation. Washington law simply takes no notice of an individual voter's party affiliation. Wash. Rev. Code § 29.07.070, App. at 85a. By contrast, California's voters are (and were throughout the time California used a blanket

[7] Near the end of the majority opinion, the Court described a "nonpartisan primary" which, in the Court's opinion, would serve many of the interests asserted by California without burdening political party rights. In the system described, after qualified candidates competed in the primary, the top two vote getters (or however many the state might prescribe) would move on to the general election. As the Court observed: "This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee." *Cal. Dem. Party*, 530 U.S. at 585-86. Although Washington's primary is not identical to the one described, it shares with it the feature that primary voters are not choosing the parties' nominees.

primary) asked to affiliate with a political party as a part of their registration process, thus producing a list of the members of each party. Cal. Elec. Code § 2150, App. at 101a.[8]

Given California's party registration system, it was a simple matter to define the "membership" of each party as the set of voters registered as affiliated with that party. In such a system, the blanket primary introduced an anomalous element by opening each party's nomination process to the "members" of all the parties. This was the basis of this Court's judgment that California's blanket primary impaired the associational rights of the parties, which were otherwise defined *in California law itself* around the concept of party membership. In other words, California law simultaneously (1) defined party membership and made it an important factor in the election system, but (2) through the blanket primary, permitted the "members" as defined to participate in the nomination of candidates of other parties.

The same analysis cannot be applied to Washington, where there is no definition of party "membership". The voters in Washington do not participate in separate "party nomination" primaries, but in a single primary, open to all voters, whose purpose is not to designate party "nominees" or "standard bearers" but to winnow the field of candidates who will appear on the general election ballot. Washington law does not describe candidates

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[8] Citations to California statutes in this petition are to the form in which those statutes existed prior to this Court's decision in *Cal. Dem. Party*.

qualifying for the general election as party nominees. Wash. Rev. Code § 29.30.101, App. at 97a.[9] Candidates for both partisan and nonpartisan offices are called candidates seeking "nomination at a primary". Wash. Rev. Code § 29.30.101, App. at 97a.

Although Washington does not choose to operate party nominating systems for the political parties, political parties do play visible and important roles in the election system. First, the party affiliation *of the candidates* (based purely on self-designation, with no further test of party "membership") partially determines which candidates in the primary will advance to the general election. A candidate filing for partisan office indicates a party designation on the declaration of candidacy. Wash. Rev. Code § 29.15.010(3), App. at 88a. At the primary, every voter may vote for any candidate for each office, without regard to party designation. Wash. Rev. Code § 29.18.200, App. at 92a. To qualify for the general election ballot, a candidate must obtain at least one percent of the total votes cast for an office, as well as a plurality of the votes cast for all candidates for that office who have listed the same party designation. Wash. Rev. Code § 29.30.095, App. at 96a. This virtually assures that general election voters will have a choice not only between candidates as individuals but between

[9] *Cf.* Cal. Elec. Code § 15451 (referring to a successful primary candidate as the "nominee of that party"), App. at 113a.

candidates who have a variety of party designations.[10]

Second, minor parties nominate candidates by convention before the primary is conducted.[11] Wash. Rev. Code § 29.24.020, App. at 94a. Independent candidates qualify for the ballot in the same way. Wash. Rev. Code § 29.24.020, App. at 94a. After being nominated by convention, minor party candidates receive certificates of nomination and are placed on the primary ballot, along with candidates designating major party affiliation. Wash. Rev. Code § 29.24.070, App. at 96a. In that sense, a minor party candidate is also the "nominee" of the party. The basis for this distinction is that minor parties, already having weak ballot strength, are allowed to designate a single "standard bearer" to appear on the primary ballot.[12]

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[10] Thus, Washington voters may have the opportunity to choose, at the general election, among a self-designated Republican, a self-designated Democrat, and an independent candidate. This does not render the candidates "nominees" of their respective parties—they may or may not enjoy the support of the party organizations—but is designed to give the voters a choice among candidates designating different parties.

[11] If a candidate designating a party receives at least five percent of the total vote cast for president, vice president, United States Senator, or a statewide office at a general election held in an even-numbered year, that party qualifies as a "major" political party. Wash. Rev. Code § 29.01.090, App. at 85a. All other organizations fielding candidates are "minor" political parties. Wash. Rev. Code § 29.01.100, App. at 85a.

[12] Major parties may lawfully endorse particular candidates in the primary. They may not, however, lawfully keep non-endorsed candidates from filing for office, nor may they interfere with the blanket primary as the determining

Third, Washington law gives political party organizations a limited role in filling vacancies on the ballot. *See* Wash. Rev. Code § 29.18.150, App. at 89a (party may certify a candidate if no one designating that party files for a partisan office); Wash. Rev. Code § 29.18.160, App. at 90a (party may fill vacancy caused if a candidate for partisan office dies or is disqualified after the filing period but before the election). In either of those cases, the purpose of state law is not to transform the primary into a party nominating process, but to preserve, to the greatest extent practical, the choice voters will have in the upcoming election.

Washington law seeks to afford the state's voters maximum participation at each stage of the election process without completely foregoing the advantages of interparty competition. The primary is not conducted by, for, or through the political parties, but by and for the general electorate. Within this system, political party organizations are fully free to perform all the functions performed in any jurisdiction, including the freedom to endorse and support favored candidates. Above all, Washington is not a state in which one qualifies for the general election ballot by becoming the "nominee of a political party". Thus, the *Cal. Dem. Party* analysis may not be mechanically applied to a state that employs the blanket primary in a wholly distinct way from California's.

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factor on which candidate advances to the general election. Washington's distinct treatment of minor parties was upheld by this Court in *Munro* as having a rational basis and as advancing legitimate public policies. *Munro*, 479 U.S. at 195-99.

3. The Ninth Circuit Opinion

Although the *Cal. Dem. Party* decision clearly holds open the possibility that a blanket primary may be permissible in some circumstances not present in the California case, the Ninth Circuit in this case proceeds from the proposition that *Cal. Dem. Party* invalidates the use of the blanket primary under any circumstances. From the observation that Washington and California have both operated "blanket" primaries, the Court of Appeals jumps to the conclusion that the "Washington scheme is materially indistinguishable from the California scheme". *Dem. Party Wash.*, App. at 13a; *see also* 13a-15a. The Ninth Circuit opinion attempts no analysis of the important distinctions between the roles played by parties and party affiliation in the two states, nor does it grapple, even briefly, with the notion that the associational rights of a party with a membership defined in state law may vary considerably from those of a party in a state which takes no official notice of party membership.

An analysis of Washington's election system, unlike California's, cannot proceed from the premise that a party's "membership" is legally entitled to use the state primary to nominate its candidates for partisan elective office. In contrast to California, Washington fully honors the private status of the political parties, by making their "endorsement" or "nomination" of candidates an entirely private process, neither regulated nor recognized by state election law. Washington's system invites the next question: whether Washington's law, by giving party affiliation some role to play in determining access by

candidates to the general election ballot, invokes the same panoply of party associational rights that this court recognized in *Cal. Dem. Party*. This issue is worth careful analysis, and Washington stands ready to show how its blanket primary operates consistently with the full exercise by all political parties of their constitutional rights. The Ninth Circuit opinion, however, merely assumes the problem away and spends most of its analysis on ancillary issues.[13]

Furthermore, the Ninth Circuit opinion appears to expand the associational rights of parties considerably beyond those set forth by this Court in *Cal. Dem. Party*. In the California case, this Court found that where a state uses a party nomination process to select candidates, it must give due deference to the associational rights of the parties. *See* discussion *Cal. Dem. Party*, 530 U. S. at 573-74 (constitution reserves special protection for process by which a political party selects a standard bearer). In failing to analyze how the *Cal. Dem. Party* principles apply in a state which does not use its law to chose "party standard bearers", the Ninth Circuit appears to conclude that the constitution affords parties the unlimited right to choose their nominees for public office and require states to recognize these nominations by placing them on the general election

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[13] The Ninth Circuit spends about half of its opinion analyzing whether Washington showed sufficient state interest to justify the "burden" placed on the political parties by Washington's election laws. *Dem. Party Wash.*, App. at 18a-24a. Washington's principal argument is that the state imposes no burden on party constitutional rights which would require the showing of a "compelling interest".

ballot. *Dem. Party Wash.*, 15a-16a ("Party adherents are entitled to associate to choose their party's nominees for public office.").[14] Because there is no supporting analysis, the Ninth Circuit opinion can be read to say either that (1) Washington's law amounts to the choosing of party "standard bearers" because of the statutory provision limiting the general election ballot to only one candidate per party designation for each office, or (2) as soon as an office is defined as "partisan", parties have a right to control how their candidates for that office will be nominated, or even (3) parties have a constitutional right to nominate candidates for any office, partisan or not.[15]

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[14] Washington expects the respondent political parties to argue, based on the Ninth Circuit decision, and to some extent on *Tashjian,* that exercise of their constitutional rights of association entitles each political party to require the state to conduct a party primary, or to honor nominations made by caucus or convention, or some combination of the above, as each party may determine (or redetermine) from time, notwithstanding the choices made by other parties or the election policies of the state Legislature. In other words, they envision the state as a sort of electoral "short order cook" implementing each party's choice of a preferred nomination system, even if this means operating a "closed" primary for one party, an "open" primary for a second, and a "nomination by convention" for a third. It is not even clear that they would concede that a state could escape this role by redefining offices as nonpartisan.

[15] Even assuming Washington's current law is constitutionally defective, the Ninth Circuit opinion casts a shadow of uncertainty over the state's legislative options in choosing an election system to replace the current blanket primary. Without knowing precisely why the current law is defective, the state Legislature is hampered in crafting a solution to resolve the constitutional issues.

Washington has operated for nearly seven decades with an election system that decouples the notion of "party nomination" from the process of qualifying candidates for the general election. Washington fully honors the rights of the political parties as private organizations to associate with one another, endorse, support, and campaign for favored candidates for office.[16] Washington does not, however, yield to private organizations the decision who will appear on the state's election ballot, assigning that role to the general electorate, and is aware of no authority holding that a state is constitutionally compelled to do so.

In *Cal. Dem. Party*, this Court found that the election laws of another state, California, violated the constitutional rights of political parties and could not be enforced. Neither Washington's statutes nor the reasoning of the Washington Supreme Court were before the Court for review. The Ninth Circuit brushed aside the state court cases as simply irrelevant in light of *Cal. Dem. Party*. *Dem. Party Wash.*, 10a-11a[17]. Washington's popular and long-established system, the survivor of multiple litigation challenges in the past, deserves better than

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[16] In that sense, parties are perfectly free to "nominate" candidates for public office. They must use the state's election system, however, to qualify their candidates for the ballot.

[17] The Ninth Circuit was responding to an argument made by intervenor Washington State Grange that the Washington cases have *res judicata* effect, at least as to the Republican and Democratic parties in Washington. The state is not here asserting that the Washington cases bar the parties from relitigating the issue, but does assert that the Washington Supreme Court decision is entitled to considerable deference.

the cursory treatment afforded by the Ninth Circuit opinion. In *Cal Dem. Party*, this Court took pains to recognize the fundamental role of the states in deciding how to conduct their elections. *Cal. Dem. Party*, 530 U.S. at 572. Following that line of reasoning, this Court should carefully weigh the nature of Washington's election system in light of the parties' claims and should come to the same conclusion reached by the state court: that the blanket primary *as used in Washington* leaves political parties vigorous and free to exercise their constitutional rights while opening all stages of the election process to full participation by all interested voters.

C. The States And The People Need The Guidance Of This Court On A Fundamental Issue Involving The Right To Vote

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).[18] This case involves the fundamental issue of voting rights from three separate points of view: (1) the rights of individual voters to participate in various stages of the election process which will choose their officers and representatives; (2) the rights of voters to aggregate into political parties and to participate as parties in the election process; and (3) the authority

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[18] *See also Reynolds v. Sims,* 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.").

of sovereign states, acting through their legislative bodies, to determine how to order the election process. In this case, Washington has devised an election system that maximizes the electoral franchise and grants state voters broad participation in the nomination process as well as in the general election. The political parties assert that this attempt to further the interests of the voters *as individuals* results in unconstitutional impairment of the rights of voters *as aggregated into political parties*. The answer to the question will determine how the election process itself will operate, and thus will "set the rules" for the functioning of state government as well as for the choice of the state's representatives in Congress.

Ordinarily, this Court grants writs of certiorari in cases where there is a conflict between the circuits at the appellate level in the federal courts, or a conflict between a federal court of appeals and a state court of last resort. *See* Rule 10. Cases involving voting and elections have, wisely, been one of the areas of the law in which this Court relaxes these standards at times to clarify fundamental issues which are at the "heart of democracy". The following are examples of cases in which this Court granted review in cases involving elections without requiring a conflict in the decisions of other courts:

a. In *Rice v. Cayetano*, 528 U.S. 495 (2000), this Court considered the constitutionality of a Hawaii law restricting the franchise in the election of trustees of the Office of Hawaiian Affairs, a state agency, to native Hawaiians. Since no other state has a

similar law, there was no conflict among circuits on this precise issue.

b. In *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), this Court considered challenges to a Virginia law permitting a political party to charge candidates a registration fee to participate in the party's nominating process. Again, Virginia appears to be the only state with such a provision.

c. In *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), this Court granted review of an Arkansas law purporting to impose term limits on certain state and federal offices. Although there were term limits cases pending in more than one circuit, the Court did not wait for a conflict to develop, but granted petitions "[b]ecause of the importance of the issues". *U.S. Term Limits*, 514 U.S. at 786.

d. In *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), this Court reviewed a Connecticut law which limited participation in the party primary to registered party adherents, even though one political party sought to open its nomination process to independent voters. Although a number of states had similar provisions, the Court did not wait for a conflict in lower court decisions to develop.

Since Washington is the only state continuing to use the blanket primary, it is unlikely that a conflict will ever develop among the circuits on the proper interpretation of this Court's *Cal. Dem. Party*

decision or the general issue of the constitutionality of blanket primaries.[19] Yet, as in the other cases cited, this case involves fundamental issues at the heart of the democratic process: whether there are any circumstances in which states may permit voters to participate broadly in nominations for partisan offices, whether a state may use party affiliation as a factor in deciding which candidates will be on the general election ballot without yielding control of the nomination process to the political parties, and whether political parties are entitled to commandeer the state election machinery to implement their privately chosen party nomination choices.

CONCLUSION

For the foregoing reasons, the Petition For A Writ Of Certiorari should be granted.

RESPECTFULLY SUBMITTED.

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[19] As discussed below, the Ninth Circuit's decision does conflict with earlier decisions by the Washington Supreme Court.